Filed 3/28/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUDY BETANCOURT, Defendant and Appellant.	B149980 (Super. Ct. No. VA 055029)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Marc E. Turchin and Jeffrey B. Kahan, Deputy Attorneys General, for Plaintiff and Respondent.

Is it cruel and unusual to impose a prison sentence of life without parole on a defendant who has beaten his victim to death during the course of a robbery, even if the defendant did not intend to kill? We conclude it is not and reject defendant's claim to the contrary.

BACKGROUND

The victim, Ulsh, in his 60s, spent the evening in a bar buying drinks for several women and flirting with the woman who was "leading the Karaoke." Ulsh was quite drunk and soon became obnoxious and profane. During the course of the evening he repeatedly flashed "a really thick stack of, like, $20 bills." At one point, Ulsh started cursing the bartender because she would not deliver drinks to the tables. The bartender ordered Ulsh to leave the bar. Ulsh became irate. Defendant managed to get Ulsh to calm down somewhat and escorted Ulsh out of the bar.

Once outside, defendant inflicted fatal head injuries on Ulsh and left him lying on his back, spread-eagled in the street in a traffic lane.[1] Defendant relieved Ulsh of his money.

The deputy medical examiner concluded Ulsh had been beaten and had suffered several severe head injuries, including a fractured skull. Some of the injuries could have been sustained when Ulsh fell to the pavement.

A jury convicted defendant of murder and robbery and found true the special circumstance that the killing took place during a robbery. The trial court imposed a prison sentence of life without the possibility of parole.

DISCUSSION

Even an accidental killing is murder if committed during the course of certain felonies, including robbery. Defendant argues that life without parole under this felony murder rule constitutes cruel and unusual punishment in that it punishes him for an unintended homicide. Relying in part on *People v. Dillon* (1983) 34 Cal.3d 441,

---

[1] "[H]e wasn't actually in the middle of the lane, but he was close enough to be considered in the lane versus in the parking."

defendant says his sentence is disproportionate to his culpability and violates the state and federal prohibitions against cruel and unusual punishments. The *Dillon* court reduced to second degree the first degree murder conviction of a 17-year-old. The court held that putting a teenaged murderer in prison for 25 years to life, "coupled with the disgrace of being stigmatized as a first degree murderer" was too harsh. (*People v. Dillon, supra,* 34 Cal.3d at p. 487.)

Dillon is increasingly honored only in the breach. Even so, we find sufficient distinction between this case and *Dillon* that defendant's claim must be rejected. "Dillon, a 17-year-old high school boy, had gone with some companions to steal marijuana from a marijuana farm. Dillon fatally shot a man who was guarding the marijuana crop. Dillon testified that he panicked and shot the victim because the man was armed, because Dillon believed he had just shot two of his friends, and because he believed the man was about to shoot him. Dillon's companions all received minor sentences in the incident, Dillon had no prior record, and the jury had expressed some reluctance at finding Dillon guilty of first degree felony murder." (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1146-1147.)

By contrast, in *People v. Guinn, supra*, 28 Cal.App.4th 1130, the 17-year-old defendant was sentenced to life without the possibility of parole. The defendant was idling about with several other young men and women. He decided to rob a 20-year-old man who had the misfortune to cross the defendant's path. When the defendant demanded money, the victim ran, only to be caught by the defendant and beaten to death with a baseball bat. Defendant argued "the sentence was disproportionate to him and to his offense because he was intoxicated with alcohol and PCP, because he was only convicted of murder because of the harsh effects of the felony-murder rule, because he had a limited prior record, because he was a minor at the time of the offense, because he and defendant Johnson netted only $2 from the robbery (assertedly showing a lack of sophistication), and because the LWOP sentence means he will be in prison for this offense for the rest of his life." (*Id*. at pp. 1145-1146.)

The *Guinn* court upheld the sentence, saying it was "unwilling to hold that such a legislative choice [the LWOP sentence] is necessarily too extreme, given the social reality of the many horrendous crimes, committed by increasingly vicious youthful offenders, which undoubtedly spurred the enactment [of such a severe sentence]." (*People v. Guinn, supra,* 28 Cal.App.4th at p. 1147.)

We review defendant's claim per the standards set forth in *In re Lynch* (1972) 8 Cal.3d 410. "The *Lynch* court identified three techniques courts used to administer this rule. First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions. [Citation.]" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)

The offense is severe. In order to steal money from Ulsh, defendant exerted enough physical force to kill him. Whether he intended Ulsh's death, defendant was willing to use whatever force he deemed necessary. He plainly paid no heed to the consequences of his assault. The autopsy demonstrated that defendant slugged Ulsh at least twice in the head, knocking him to the pavement with such force that Ulsh suffered a fractured skull and subdural and subarachnoid bleeding. Either a subdural hematoma or subarachnoid hemorrhage can be fatal, as can be a skull fracture. Defendant left Ulsh dying in the street. Even had defendant inflicted less than mortal injury, leaving Ulsh helpless in the street in a traffic lane might have resulted in his death.

An examination of the nature of the offender yields nothing in defendant's favor. Just after his 18th birthday, defendant committed an assault with a deadly weapon, apparently a knife. He received a misdemeanor sentence of probation. Except for vandalism and a weapon possession conviction (again apparently a knife), all of defendant's other crimes appear to be drug offenses. He served three separate prison sentences for drug offenses.

For nearly a dozen years before the murder, defendant was a weekend user of methamphetamine and had never sought treatment or counseling. He has been unable to

maintain steady employment because of his stays in prison. At the age of 35, he still lived with his mother. Defendant was on parole when he killed Ulsh.

Neither the second nor the third *Lynch* factor is of any benefit to defendant. Notwithstanding defendant's claim that his crime is less severe because he lacked intent to kill, there is no more serious crime than murder. That some murderers may receive life sentences with the possibility of parole does not render defendant's sentence unjust.

California's sentences for crimes such as defendant's are comparable to those of other jurisdictions.

In sum, there is nothing unjust or shocking about defendant's punishment. He killed a man while robbing him and must atone for that crime by forever forfeiting his freedom, a fairly common punishment for such a crime.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

MALLANO, J.